IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.23330 of 2005

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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TNT OVERSEAS IMPEX & 1 - Petitioner(s)
Versus
UNION OF INDIA & 2 - Respondent(s)

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Appearance :
MR MIHIR JOSHI, SENIOR ADVOCATE, WITH MR SN THAKKAR for Petitioner(s) : 1 - 2.
MR JITENDRA MALKAN for Respondent(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 2 - 3.

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI
Date : 03/02/2006
ORAL JUDGMENT
(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1. Heard Mr.Mihir Joshi, learned Senior Advocate on behalf of the petitioners.

2. RULE. Mr.Malkan appears and waives service of rule on behalf of the respondents. Since the controversy involved in the present petition lies in a narrow compass, with the consent of the parties, the petition is taken for final hearing and disposal today.

3. The petitioners primarily challenge order dated 20th July, 2005 passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), West Zonal Bench, Mumbai whereby the appeals preferred by the petitioners have been dismissed.

4. The facts stated briefly are : the petitioners had challenged order-in-original No.KDL/COMMR/65/2003 dated 27th November, 2003 by way of appeals before the CESTAT. By an order dated 15th July, 2004 passed on the applications preferred by the petitioners, CESTAT had directed pre-deposit of an amount of Rs.2 lakhs to be made by petitioner No.2 and that the compliance thereof be reported by 17th September, 2004. It appears that the petitioners had not received the order directing the pre-deposit hence, the same could not be complied with and consequently, the appeals were dismissed for non-compliance. Pursuant to the dismissal of the appeals, respondent No.3 sought to dispose of the confiscated goods by way of tender auction.

5. The petitioners filed a writ petition before this Court being Special Civil Application No.1784 of 2005, challenging the said auction proceedings as well as the order dated 17th September, 2004 dismissing the appeals of the petitioners. This Court by a judgment and order dated 21st April, 2005 disposed of the said petition by setting aside the auction proceedings while leaving it open to the petitioners to move CESTAT in relation to the restoration application which had already been filed before CESTAT. The petitioner was also directed to deposit a sum of Rs.5 lakhs.

6. In compliance with the aforesaid directions of this Court, the petitioners deposited Rs.5 lakhs on 24th February, 2005. By an order dated 2nd June, 2005, CESTAT recalled the order dated 17th September, 2004 and restored the appeals to file since the pre-deposit amount as directed had been deposited. It is necessary to note that while recalling the order dated 17th September, 2004, CESTAT fixed the case for regular hearing on 22nd June, 2005. However, it appears that on the said date i.e. 22nd June, 2005 the appeals were not listed for hearing. Thereafter the Registrar of CESTAT issued notice on 27th June, 2005 fixing the appeals for hearing on 20th September, 2005. However, the petitioners did not receive the said notice of hearing. The said notice was also

addressed to and served upon the learned advocate appearing on behalf of the petitioner-firm before CESTAT. By a letter dated 15th July, 2005, the concerned advocate on the ground of some personal difficulty, requested for an adjournment in respect of the hearing fixed on 20th July, 2005.

7. On 20th July, 2005, CESTAT passed the following order:

> " None appeared for the appellants. There is a request for adjournment which is rejected as no convincing reasons have been given. Heard Shri Vimlesh Kumar, learned S.D.R. for the Department. This is a case where the impugned goods imported under the DEEC scheme have been illegally diverted for sale in the market. As such we find no reason to interfere with the detailed order passed by the adjudicating Commissioner. However, we find that penalty of Rs.1,11,41,840/- has been imposed on the appellant firm which is equal to the duty involved and in addition a penalty of Rs.15 Lakhs has been imposed on the second appellant who is a partner in the appellant firm. Though imposition of penalty is justified, we find that the penalty amounts determined are excessive. As such, we reduce the penalty on the appellant firm and the appellant partner to 25% of each of the amounts imposed. The appeals are otherwise rejected."

It is this order which is subject matter of challenge in the present petition.

8. The learned counsel for the petitioners submitted that the impugned order has been passed in breach of the principles of natural justice, and that the petitioner has not been granted sufficient opportunity of hearing. Reliance was placed upon Rule 18(1) of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 (the Rules) to submit that CESTAT was required to notify to the parties the date and place of hearing. That the petitioners had not received any notice fixing the appeals for hearing on 20th July, 2005, which amounts to non-compliance with the provisions of Rule 18(1) of the Rules. It was submitted that the impugned order suffers from the aforesaid legal infirmity and is, therefore, required to be quashed and set aside.

9. On behalf of the respondents it was submitted that as the learned advocate appearing on behalf of petitioners had been duly served with a notice of hearing, it amounted to sufficient compliance with the provisions of Rule 18 of the Rules and as such there was no infirmity in the impugned order.

10. As can be seen from the order dated 2nd June, 2005, CESTAT while restoring the appeals had fixed the same for hearing on

22nd June, 2005. It appears from the record, that the appeals were not listed for hearing on 22nd June, 2005. Thereafter, notice of hearing was issued fixing the appeals for hearing on 20th July, 2005, however, the same was served only upon the learned advocate appearing on behalf of petitioners. It is not in dispute that the petitioners were not served with a notice of hearing. In the circumstances, it cannot be said that the provisions of Rule 18(1) of the Rules which requires of CESTAT to notify the parties the date and place of hearing of the appeal or application have been sufficiently complied with. In view of the provisions of Rule 18(1) of the Rules, it was incumbent upon CESTAT to issue a notice of hearing to the petitioners. Moreover, CESTAT has not assigned any convincing reason as to why the request for adjournment made by the learned advocate appearing on behalf of the petitioners could not be granted. If CESTAT was not satisfied with the reason advanced for making the request for adjournment, it could have imposed costs for granting the same, making it clear that no further adjournment would be granted. This being the first request for adjournment, CESTAT was not justified in proceeding with such undue haste.

11. This Court in the case of Sanghani Bright Steel Vs. Union of

India, 2005 (186) E.L.T. 279 (Guj) has laid down as follows:

> "It is necessary for CESTAT to bear in mind that under main provisions of the Central Excise Act,1944,(the Act), it is empowered to hear and decide the appeal so as to finally adjudicate upon the rights of the parties viz. assessee and the department for the purpose of ascertainment of liability to duty or otherwise under the Act. Any decision which affects the rights of the parties, especially of an assessee, where the assessee is ultimately going to be called upon to pay duty has to take within its fold the principles of natural justice. In other words a party which is liable to be affected by the final outcome is required to be granted an opportunity of proper and reasonable hearing in accordance with law.
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> 17. It is this fundamental principle which forms the basis of Rule 18 of the Rules. The said rule provides for date and place of hearing. Under sub-rule (1) of Rule 18 of the Rules it is provided that CESTAT shall notify the date and place of hearing of the appeal and/or application to the parties. Sub-rule (2) of Rule 18 of the Rules states that the issue of the notice referred to in sub-rule (1) shall not by itself be deemed to mean that the appeal or application has been admitted. Therefore, when Rule 18 is read as a whole it envisages not only any notification of hearing on the notice board of CESTAT but

> issuance and service of individual notice to the party. Therefore, even under the Rules, it becomes necessary for CESTAT to ensure that proper notice, as may be prescribed, is issued and served on the parties. This would also take within its fold adequate notice. In other words notice should ensure that adequate time is available for either of the parties to make proper arrangement to appear and represent its case.
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> 18. In the present case, principal grievance of the petitioner was and even exists today, that the petitioner was never served with notice of hearing of the appeal, and hence application for restoration. .....”

12. Considering the principles laid down in the aforesaid decision, it cannot be said that the petitioners have been granted a proper and reasonable opportunity of hearing, in accordance with law. The impugned order dated 28th June, 2005, therefore, suffers from the vice of breach of principles of natural justice as well as non-compliance of the provisions of Rule 18(1) of the Rules.

13. In the result, the impugned order dated 28th July, 2005 made by CESTAT in Appeal Nos.C/431 and 432 of 2004 – Mum. is hereby quashed and set aside and the appeals are restored to

the file of CESTAT. In view of the pendency of the appeals, the order granting stay would stand revived during the pendency of the appeals.

14. CESTAT is hereby directed to hear the parties and thereafter pass an order in accordance with law. In the first instance the parties shall appear before CESTAT on 17th February, 2006 so as to enable CESTAT to fix up the date of hearing in accordance with its own calender. Considering the chequered history of the case, it is made clear that the petitioners shall not seek any further adjournment.

15. The petition is, accordingly, allowed. Rule made absolute. There shall be no order as to costs.

Sd/-
[D.A. MEHTA, J]

Sd/-
[H.N. DEVANI, J]

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*Bhavesh**